

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8  
9 UNITED STATES OF AMERICA,  
10 Plaintiff,  
11 v.  
12 LYNN ELLEN SCHNEIDER,  
13 Defendant.

NO. CR-08-2040-RHW

**ORDER DENYING  
DEFENDANT'S MOTION FOR  
NEW TRIAL**

14 Defendant was convicted of Tampering with Consumer Products, in  
15 violation of 18 U.S.C. § 1365(a). She now invokes FED. R. CRIM. P. 33 and moves  
16 the Court for a new trial. Her primary contention is that the Court erred in  
17 admitting evidence under Rule 404(b). Although Defendant has retained new  
18 counsel, her trial attorney filed the current motion. The Court has considered the  
19 matter without oral argument, and, for the reasons below, it denies Defendant a  
20 new trial.

21 **FACTUAL BACKGROUND**

22 Defendant, a registered nurse, was charged with diverting narcotics from  
23 surgical syringes and refilling the devices to conceal the theft. The Indictment  
24 alleges this conduct occurred at Skyline Hospital in White Salmon, Washington.  
25 Before trial, Defendant moved to exclude prior acts evidence from four previous  
26 healthcare facilities at which she worked. (Ct. Rec. 95). The Government's proffer  
27 indicated that circumstances at these facilities demonstrated that Defendant had  
28 engaged in tampering there, too. The Court admitted allegations from three of

1 Defendant's prior jobs, finding them specific enough to show motive and *modus*  
 2 *operandi*. (Ct. Rec. 112). Evidence from the fourth was excluded due to an  
 3 insufficient nexus between Defendant and the alleged acts. *Id.*

4 At trial, the Government offered testimony relating to Skyline Hospital, as  
 5 well as that concerning the previous employers that the Court admitted. Limiting  
 6 instructions were given both orally during the presentation of the 404(b) evidence  
 7 and in the final written instruction packet. (Ct. Rec. 143, at 21). The jury returned  
 8 a guilty verdict.

### 9 **STANDARD OF REVIEW**

10 Upon a timely motion,<sup>1</sup> the Court may grant criminal defendants a new trial  
 11 "if the interests of justice so requires." FED. R. CRIM. P. 33. The burden of  
 12 justifying a new trial rests with the Defendant, *see United States v. Endicott*, 869  
 13 F.2d 452, 454 (9th Cir. 1989), and a motion for new trial is directed to the Court's  
 14 discretion. *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). It is relief  
 15 granted only in "exceptional cases." *United States v. Showalter*, 569 F.3d 1150,  
 16 1157 (9th Cir. 2009).

### 17 **ANALYSIS**

#### 18 **A. The Court Already Ruled on the Challenged 404(b) Evidence**

19 The majority of Defendant's argument is grounded in her assertion that the  
 20 Court should not have admitted evidence from her previous places of employment.  
 21 This is not a new contention. That evidence was the subject of Defendant's pretrial  
 22 motion that was granted in part and denied in part in a twelve-page opinion.  
 23 During trial, the Court several times gave a limiting instruction during the  
 24 Government's presentation of the 404(b) evidence, both at the behest of

25 \_\_\_\_\_  
 26 <sup>1</sup> Motions based on a reason other than newly-discovered evidence must  
 27 normally be brought within seven days of the guilty verdict. Although Defendant  
 28 missed this deadline, she requested an additional week to file her claim, to which  
 the Government did not object. The Court therefore considers Defendant's request  
 timely.

1 Defendant's counsel and on its own motion. The final language of Jury Instruction  
2 No. 20, which was used during deliberations, was endorsed by Defendant. The  
3 Court believes jurors understood the role such evidence was to play in their  
4 decision to convict.

5 Defendant also finds the Court's reliance on *United States v. Cunningham*  
6 misplaced. 103 F.3d 553 (7th Cir. 1996). In that case, the district court, applying  
7 the motive and *modus operandi* exceptions to Rule 404(b), admitted evidence that  
8 a nurse charged with tampering might also have done so in the past. Defendant  
9 points to several factual differences between her circumstances and those in  
10 *Cunningham*. However, the Court already considered those distinctions when it  
11 ruled on Defendant's motion to exclude. (Ct. Rec. 112, at 7-8). Ultimately, while  
12 this argument may be the proper subject of an appeal, it is not compelling on a  
13 motion for a new trial.

#### 14 **B. Collateral Estoppel is Not Applicable**

15 Defendant also contends that collateral estoppel should have barred  
16 reference to alleged conduct during her employment at Three Rivers Community  
17 Hospital in Grants Pass, Oregon. That doctrine prohibits the re-litigation of issues  
18 of ultimate fact that have been previously adjudicated. *Ashe v. Swenson*, 397 U.S.  
19 436, 443 (1970). Defendant notes that, for the purposes of determining  
20 unemployment benefits, an Oregon administrative law judge found that she did not  
21 engage in "misconduct" while working at Three Rivers. However, this argument  
22 fails. Defendant was not tried here based on conduct at any facility in Oregon;  
23 rather, the Indictment concerns her actions at Skyline Hospital. Implicit in  
24 admission of the Rule 404(b) evidence was the Court's belief that it posed "a  
25 minimal danger of luring the jury to declare guilt on any basis other than proof  
26  
27  
28

1 specific to the instant offense.” (Ct. Rec. 112, at 8). Collateral estoppel simply  
2 does not apply.<sup>2</sup>

3 **CONCLUSION**

4 Accordingly, **IT IS HEREBY ORDERED** that Defendant’s Motion for  
5 New Trial (Ct. Rec. 150) is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
7 order and to provide copies to counsel.

8 **DATED** this 28<sup>th</sup> day of April, 2010.

9  
10  
11 *s/Robert H. Whaley*  
12 **ROBERT H. WHALEY**  
United States District Judge

13 Q:\CRIMINAL\2008\Schneider\deny.new trial.ord.wpd  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>2</sup> Even were Court persuaded by Defendant’s collateral estoppel argument,  
28 Oregon law expressly limits administrative dispositions to that context. *See* OR.  
REV. STAT. § 657.273(1) (administrative rulings “may not be used for the purpose  
of claim preclusion or issue preclusion in any other action[.]”).